IT 01-11
Tax Type: Income Tax
Issue: Unitary Apportionment
Allocation of Partnership Income

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	)	Docket No.	99-IT-0000
OF THE STATE OF ILLINOIS	)	FEIN	00-0000000
v.	)	Tax Years Ending	12/93-12/95
"ACME OIL PIPELINE COMPANY",	)	John E. White,	
Taxpayer.	)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

This matter involves the Illinois Department of Revenue's ("Department['s]") denials of amended returns "Acme Oil Pipeline Company" ("ACME" or "taxpayer") filed regarding its 1993 through 1995 tax years. "ACME" filed its amended returns to request a refund of Illinois income tax previously reported and paid for those years. On its original combined Illinois returns for the years at issue, "ACME" included within its combined unitary base income the income it received as a partner in partnerships whose activities were unitary with "ACME's" business activities conducted within the water's edge of the United States. "ACME" filed its original returns pursuant to Illinois income tax regulation § 100.3380(c) (hereinafter, "§ 3380(c)"). "ACME's" amended returns, and its protest, were based on "ACME's" assertion that regulation § 3380(c) is invalid. This matter also involves a Notice of Deficiency the Department issued which proposes to increase the amount of Illinois income tax due for tax years ending 1994 and 1995.

After a period of discovery, the parties agreed to proceed via the submission of a

stipulated record in lieu of hearing. I am including within this recommendation findings of fact and conclusions of law. I recommend that the issues be resolved in favor of the Department.

Findings of Fact:

1. "ACME" is a Delaware Corporation with its corporate domicile in the State of (Somplace). Stipulation of Facts ("Stip.") ¶ 1.

2. "ACME" is a subsidiary of "Ajax Oil Company", which is a subsidiary of "ACME" America, Inc. Stip. ¶ 2.

3. "ACME's" principal business is the transportation of crude oil by pipeline throughout the United States, including Alaska and Illinois. Specifically, "ACME" owns a series of oil pipelines across the lower 48 (contiguous) United States, some of which are located in Illinois. Stip. ¶ 4.

4. During tax years 1993, 1994 and 1995, "ACME's" unitary affiliates (*see infra*, finding of fact no. 5) were the owner of interests in certain partnerships (which will hereinafter be referred to as the "Alaska Pipeline Partnerships" or the "Partnerships"), which engaged in the transportation of oil through pipelines:

   - "Mukluk Transportation Company" ("Mukluk"),
   - "Inuit Pipeline Company" ("Inuit"), and
   - "Tubarek Aleut Pipeline System" (""TAPS"")

   "Mukluk", "Inuit" and ""TAPS"" are partnerships for federal income tax purposes and are partnerships as described in 35 **ILCS** 5/1501(a)(16). All of these partnerships except for "TAPS" filed partnership information tax returns with the Internal Revenue Service ("IRS"). "TAPS" received a ruling from the IRS stating that "TAPS" constitutes a partnership for federal income tax purposes among its

owners, and that the owners could make the election described in Section 761(a) of the Internal Revenue Code, as amended in 1986 (“Code”). Stip. ¶ 5.

5. "ACME Pipelines (Alaska), Inc." (“"ACME Alaska”) is a unitary affiliate of "ACME". "ACME Alaska" holds "ACME's" interest in "TAPS". "ACME Alaska" owns "ACME Transportation (Alaska), Inc." ("ACME Transportation Alaska”), which is also a unitary affiliate of "ACME". "ACME Transportation Alaska" holds "ACME's" interest in the "Mukluk" and "Inuit" partnerships. Stip. ¶ 3.

6. "ACME" operates over 1,600 miles of crude and products pipelines in eight (8) states. Stip. ¶ 6. The pipeline systems are divided into four (4) major operational areas – the Illinois/Indiana crude oil supply system; the Ohio/Kentucky products distribution system; the Louisiana/Mississippi crude oil supply and products distribution system; and the Pennsylvania/New Jersey products distribution system. The Illinois/Indiana crude oil supply system can be divided into two (2) sections: a 10” pipeline originating in (City 1), IL, and terminating in (City 2), IL tankage, and a 12” pipeline originating in (City 2), IL and terminating in (City 3), OH, tankage, which in turn supplies "ACME's" (City 3) refinery. Stip. ¶ 6.

7. For purposes of this matter, "ACME" concedes that its activities and the activities of the Partnerships constituted a unitary business as defined in 35 **ILCS** 5/1501(a)(27) and that all the income derived from those interests constituted “business income” of "ACME", as defined in 35 **ILCS** 5/1501(a)(1) of the Illinois Income Tax Act (“IITA”), except that "ACME" argues the following:

- "ACME" contends that it does not have a unitary business relationship with the Partnerships, solely by reason of the fact that "ACME" does not have the

required ownership and control in any of the Partnerships; and

- "ACME" contends that its share of the income from the Partnerships is not taxable by Illinois by virtue of 35 **ILCS** 5/305.

Stip. ¶ 7.

Facts Regarding "ACME's" Illinois Income Tax Returns as Filed, and the Department's Adjustments

8. "ACME" timely filed combined unitary Illinois income tax returns for tax years 1993, 1994 and 1995. Stip. ¶ 8; Stip. Exs. 10-12. For all three taxable years, "ACME" filed unitary Illinois income tax returns which included "ACME Alaska" and "ACME Transportation Alaska". Stip. ¶ 8.

8. On its 1993, 1994 and 1995 combined Illinois corporate income tax returns as originally filed, "ACME" included its proportionate share of the income and apportionment factor barrel miles of the Alaskan Pipeline Partnerships in the base income and apportionment factors of the "ACME's" unitary business group. Stip. ¶ 9.

9. In its 1993 amended tax return (IL-1120-X), "ACME" excluded from its unitary business group the income and apportionment factor barrel miles of the Alaskan Pipeline Partnerships. "ACME's" refund claim amount for the tax year is attributable entirely to this exclusion of income and barrel miles. Stip. ¶ 10.

10. On February 8, 1999, "ACME" filed amended returns (IL-1120-X) for its tax years ended December 31, 1994 and 1995 to request a refund of corporate income taxes. On March 17, 1999, "ACME" filed additional amended returns for these years, which superseded the first set of amended returns. "ACME" filed refund claims in the amount of $126,630 for 1994 and $336,207 for 1995. Stip. ¶ 11.

11. On none of its original or amended returns did "ACME" use the world-wide method of combined apportionment, which method the Illinois Supreme Court approved for cases involving unitary business groups in Caterpillar Tractor Co. v. Lenkos, 84 Ill. 2d 102, 417 N.E.2d 1343 (1981). Stip Exs. 10-16. Instead, on all of the original and amended returns filed by "ACME" for the years at issue, "ACME" used the water's edge method of combined apportionment, as required by § 304(e) and described by § 1501(a)(27) of the IITA, and which method the Illinois General Assembly adopted following the 1981 Caterpillar decision. Stip. Exs. 10-12 (original combined Illinois income tax returns for 1993-1995, respectively), 13 (amended combined Illinois return for 1993, filed on 3/9/98), 14 (amended combined Illinois return for 1994, filed on 2/1/99), 15 (amended Illinois combined return for 1994, dated 3/5/9), 16 (amended Illinois combined return for 1995, dated 2/1/99).

12. On July 9, 1999, and in response to "ACME's" amended returns, the Department issued a NOD to "ACME" for the taxable year 1995 in the statutory amount of $12,520. The Department issued a Notice of Denial dated July 9, 1999 denying "ACME's" claims for refund, filed on February 8, 1999 and March 17, 1999, for the tax years ending December 31, 1994 and December 31, 1995. Stip. ¶ 12.

13. On the combined amended Illinois returns for 1993-95, "ACME" did not include its distributive share of Partnership business income as part of its Illinois combined apportionable income, nor did it include its share of Partnership apportionment factors in the denominators of the revenue miles factor of its Illinois pipeline apportionment formula, for "TAPS", "Mukluk", and "Inuit". Stip.

¶ 13.

14. "ACME" did not allocate or apportion any portion of its distributive share of the income from the Partnerships to its Illinois combined apportionable income on its amended returns, because none of the Partnership income had been allocated or apportioned to Illinois by the Partnerships and because each of the Partnerships was located outside of Illinois. Stip. ¶ 14.

15. The Department conducted an audit of "ACME's" business for tax years 1994-1995, after which it issued the NOD and the Notices of Denial protested here. The NOD proposed to assess tax and penalties in the following amounts, and for the following periods:

Date of NOD	Tax Period	Tax	Penalty	TOTAL
July 9, 1999	12/31/95	$ 12,520	$ 0	$ 12,520
	12/31/94	$ (7,034)		

Stip. ¶ 15.

16. The Department auditor calculated the tax proposed in the NOD using the combined apportionment method described in IITA § 304(e), and in income tax regulation § 3380(c). Stip. ¶ 16; Stip. Ex. 5 (Department's audit work papers).

Facts Regarding "Tubarek Aleut Pipeline System"

18. During the years at issue, "ACME" Alaska owned a fifty and two-hundredths percent (50.02%) interest in the "Tubarek Aleut Pipeline System" (""TAPS""). "TAPS" consists primarily of a pipeline system, including a 48 inch pipeline approximately 800 miles in length which was used to transport crude oil from the Prudhoe Bay oil field on the north slope of Alaska south across the State of Alaska to the port of Valdez, together with related terminal facilities, pumping

stations and other equipment. Stip. ¶ 18; Stip. Ex. 18 (map of the "TAPS" pipeline system).

19. During the years at issue, "TAPS" was owned by the following partners in the following proportions:

Partner	Ownership
"ACME Transportation Alaska"	50.02%
"Astronomical Oil Company"	21.34%
"Eddie Haskel Oil Company"	20.34%
"Mountbatten Oil Company"	4.08%
"Adelaide Oil Corporation"	1.50%
"Uzbechistan Oil Corp."	1.36%
"Portnoy Oil Company"	1.36%
	100.00%

Stip. ¶ 19.

20. The owners of "TAPS" agreed to construct, own and maintain "TAPS" pursuant to the "Tubarek Aleut Pipeline System Agreement" ("TAPS Agreement") dated August 27, 1970, among the owners of "TAPS". Stip. ¶ 20; Stip. Ex. 19 (copy of the "TAPS Agreement").

21. The operation of "TAPS" was governed during the audit period by the Agreement for the Operation and Maintenance of the Trans Alaska Pipeline System which was entered into on May 20, 1977 (""TAPS" Operating Agreement"). Stip. ¶ 21; Stip. Ex. 20 (copy of the "TAPS" Operating Agreement).

22. During the years at issue, the "TAPS" Operating Agreement provided for an Owners Committee composed of one representative of each of the owners of the pipeline system. All actions of the Owners Committee required the vote of at lease three partners whose combined ownership interest equaled at least sixty-six and two-thirds percent ($66^2/_3$%) of the total partnership. Stip. ¶ 22.

23. The "TAPS Operating Agreement" provided that the Owners Committee would: (a) approve budgets; (b) approve the acquisition in the name of the owners of land rights, materials, supplies and services as required through the budget approval; (c) approve all manuals referred to in the operating agreement; (d) approve settlement of claims, initiations of lawsuits, etc., under the criteria specified in the Operating Agreement; (e) approve the disposal of material, equipment and facilities pursuant to the provisions of the Operating Agreement which provides, in part, that a sale by any means of any items of materials, equipment or facilities having a purchase price or an appraised fair market value of $1,000,000 or more must be approved in advance by the owners through the Owners Committee; (f) establish standards and procedures for connections to the pipeline system; and (g) exercise such other authorities and powers as are delegated in the agreement. Stip. ¶ 23; Stip. Ex. 20.

24. The "TAPS Operating Agreement" provided that the Owners Committee would select an operator to operate and maintain "TAPS". The Owners Committee selected "ANACONDA" Pipeline Service Company ("ANACONDA") as operator of the pipeline system and the operations of "TAPS" were maintained by "ANACONDA" during the years at issue. "ANACONDA" is a corporation that is owned by the companies that own "TAPS" in the same proportion as their ownership of "TAPS". Stip. ¶ 24; Stip. Ex. 20.

25. Each of the owners of "TAPS" had the obligation to conduct the operation of its undivided interest in the pipeline as a common carrier to the extent of its interest in the pipeline. In this capacity, each owner would (a) publish and file tariffs in

its own name, (b) separately solicit and receive tenders of petroleum from shippers, (c) separately arrange for the shipping of the petroleum and (d) separately collect and account for revenues from its own pipeline shipments. Each of the owners of "TAPS" was responsible for scheduling its own shipments through the pipeline and for the scheduling of the ships to take the oil at the Port of Valdez terminal. Stip. ¶ 25; Stip. Ex. 20.

26. The owners of "TAPS" received a letter ruling from the IRS, dated August 21, 1979, in which the IRS determined that "TAPS" was a partnership for federal income tax purposes which could utilize Section 761 of the Internal Revenue Code (26 U.S.C. § 761) to "elect out" of the partnership reporting requirements. Stip. ¶ 26; Stip. Ex. 23 (copy of the IRS Letter Ruling). The parties agree that the description of the history of "TAPS" and the operative agreements governing "TAPS" as stated in the IRS Letter Ruling are true and correct, and the description therein of the operations of "TAPS" is applicable to the years at issue herein. Stip. ¶ 26.

27. "TAPS" made the election described in § 761 of the Internal Revenue Code for all relevant years, and accordingly "TAPS" did not file a federal partnership information income tax return as a separate, distinct entity for the tax years at issue. Each of the partners in "TAPS", including "ACME Alaska", reports its revenues from the operations of "TAPS" and its share of expenses of "TAPS" (paid through "ANACONDA") directly on its own federal income tax returns. Stip. ¶ 27.

Facts Regarding "Mukluk Transportation Company"

28. During 1993, 1994 and 1995, "ACME Transportation Alaska" owned a thirty-eight percent (38.0%) interest in "Mukluk". "Mukluk" is a general partnership that owns and operates a pipeline system, including a 24 inch pipeline approximately 27 miles in length, which was used to transport crude oil from "Mukluk" River oil field in northern Alaska to "TAPS" Pump Station No. 1 in the Prudhoe Bay oil field, from where the oil was transported across the State of Alaska in the "TAPS" pipeline system. Stip. ¶ 28; Stip. Ex. 18 (map of the "Mukluk" pipeline system).

29. "ACME Transportation Alaska" was one of three owners of "Mukluk". The other owners were "Mukluk Pipeline Company" (an affiliate of "Astronomical Oil Company") (57%) and "Uzbechstan Oil Company" (5%). "Mukluk Pipeline Company" was the managing partner of "Mukluk". Stip. ¶ 29.

30. The "Mukluk Transportation Company Partnership Agreement" ("Mukluk Agreement") during 1993, 1994 and 1995 provided that the business of the partnership would be managed by a management committee consisting of representatives of each of the general partners, and that actions of the management committee generally could be approved by the affirmative vote of two or more partners whose combined ownership interest equaled at least 75 percent. Stip. ¶ 30; Stip. Ex. 26 (copy of the "Mukluk" Agreement).

31. "Mukluk" is a general partnership under Alaskan law, and as such each of its partners may be treated as agents of the partnership pursuant to Alaska Revised Statutes Section 32.05.040. However, the "Mukluk" Agreement provides that the Manager shall conduct all administrative duties of partnership, including entering

into contracts (§ IV.D), and the Manager accepts tenders for shipments of petroleum on behalf of the partnership. Section IV.A of the partnership agreement states “no Partner or its Representative shall have the authority to bind the Partnership or any other Partner except as provided therein.” Neither "Mukluk" nor any of the separate partners has communicated this restriction of authority to the general public. Stip. ¶31; Stip Ex. 26.

32. "Mukluk" filed a U.S. Partnership Return of Income on Form 1065 for 1993, 1994 and 1995. Stip. ¶ 32; Stip. Exs. 29-31 (copies of "Mukluk’s" U.S. Forms 1065 for 1993-1995, respectively).

Facts Regarding "Inuit Pipeline Company"

33. During the years at issue, "ACME Transportation Alaska" owned a fifty-seven percent (57.0%) interest in "Inuit". "Inuit" is a general partnership that owns and operates a pipeline system, including a 16 inch pipeline approximately 27 miles in length, which was used to transport crude oil from the "Inuit" oil field in northern Alaska to "TAPS" Pump Station No. 1 in the Prudhoe Bay oil field, from where the oil was transported across the State of Alaska in the "TAPS" pipeline system. Stip. ¶ 33; Stip. Ex. 18 (map of the pipeline system owned by "Inuit").

34. During the years at issue, "Inuit" was owned by the following partners in the following proportions:

Partner	Ownership
"ACME Transportation (Alaska), Inc."	56.8059%
"Alabaster Inuit Pipeline Company"	10.4940%
"Cohort Transportation Company"	00.6456%
"Dowdy, Limited"	00.1291%
"Eddie Haskel Pipeline Company"	21.0206%
"Uzbechstan Pipeline Company"	10.5174%
"National Regional Corporation, Inc."	00.3874%

100.0000%

Stip. ¶ 35.

36. "ACME Transportation Alaska" was the managing partner of "Inuit". Stip. ¶ 36.

37. The "Inuit Pipeline Company Partnership Agreement" ("Inuit Partnership Agreement") in effect during the years at issue provided that the business of the partnership would be managed by a management committee consisting of representatives of each of the partners, and that actions of the management committee generally could be approved by the affirmative vote of two or more partners whose combined ownership interest equaled at least 65%. Stip. ¶ 37; Stip Ex. 32 (copy of the "Inuit Partnership Agreement").

38. The "Inuit Partnership Agreement" provided for a 90% approval for certain specific actions including authorizing partnership indebtedness; selling, leasing or disposing of substantially all of the partnership's assets; acquiring or holding title to property other than in the name of the partnership; approval of certain products with a cost of more than $20 million; amendment of the income tax provisions of the agreement; or dissolution of the partnership. Stip. ¶ 38; Stip. Ex. 32.

39. "Inuit" is a general partnership under Alaskan law, and as such each of its partners may be treated as agents of the partnership pursuant to Alaska Revised Statutes Section 32.05.040. However, the "Inuit Pipeline Partnership Agreement" provides that the Manager shall be responsible for contracting for the operations of the partnership (section IV.E). Neither "Inuit" nor any of the separate partners has communicated this restriction of authority to the general public. Stip. ¶ 39; Stip. Ex. 32.

40. "Inuit" filed a U.S. Partnership Return of Income on Form 1065 for 1993, 1994 and 1995. Stip. ¶ 40; Stip. Exs. 35-37 (copies of "Inuit's" U.S. Form 1065 for 1993-1995, respectively).

Conclusions of Law:

This matter primarily involves "ACME's" challenge to the validity of current Department income tax regulation § 100.3380(c), which was originally adopted and made effective July 8, 1987. 86 Ill. Admin. Code § 100.3380(c); 17 Ill. Reg. 19632 (November 1, 1993) (*formerly* 86 Ill. Admin. Code § 100.3700(d); 11 Ill. Reg. 12410, 12412 (July 24, 1987)). "ACME" claims that regulation § 3380(c) is invalid for several reasons, the first of which is that it is contrary to §§ 305 and 1501(a)(27) of the IITA. Taxpayer's Post-Hearing Brief ("'ACME's" Brief"), pp. 10-16. "ACME" further argues that, while the activities of the partnerships and its activities constituted a unitary business as defined in § 1501(a)(27) if the IITA, it did not have a unitary relationship with the partnerships because it lacked the required ownership and control in any of the Partnerships. *See* "ACME's" Brief, pp. 17-19. "ACME" asserts that Illinois' attempt to apportion income from Partnerships over which it lacked ownership interests sufficient to absolutely control them violates policies announced in certain United States Supreme Court cases. *See id*., pp. 19-22. Finally, "ACME" argues that Governor James Thompson's amendatory veto of the 1982 bill that ultimately became Public Act 82-1029, and which created Illinois' scheme of mandated water's edge combined reporting for related persons who conduct a single unitary business, violated the separation of powers clause of the Illinois Constitution. *Id*., pp. 22-25. The Department, in turn, supports the validity of § 3380(c). Department of Revenue's Post Hearing Brief ("Department's Brief"), *passim*.

I. The Validity of Regulation § 3380(c).

Section 1401 of the IITA grants the Department the authority "… to make, promulgate and enforce such reasonable rules and regulations ... relating to the administration and enforcement of the provisions of [the IITA], as it may deem appropriate." 35 **ILCS** 5/1401(a). Effective July 8, 1987, regulation 3700(d) provided as follows:

> (d) Rule for inclusion of shares of partnership unitary business income and factors in combined unitary business income and factors of corporate partners.
>
> When the activities of a corporate partner (or the activities of a unitary business group including the corporate partner) and the activities of a partnership, disregarding ownership requirements, constitute a unitary business relationship, then the partner's share of the partnership's income and factors shall be combined with the business income and factors of the partner or with the combined business income and factors of the unitary business group including the partner, as the case may be. The activities of a corporate partner and the activities of a partnership will constitute a unitary business relationship when such activities are integrated with, dependent upon, and contribute to each other. However, the rule stated herein will not apply to shares of income from partnerships whose business activity outside the United States is 80% or more of such partnership's total business activity, where the partnership has a different apportionment method than the corporate partner, or where the partnership is not in the same general line of business or a step in a vertically structured enterprise with the corporate partner. This rule is applicable to all taxable years for which the statute of limitations for filing claims for refund and for issuing notices of deficiency are open, except those tax years ending on or after the effective date (April 24, 1984) of Section 100.9700(e)(2) and ending prior to its repeal where the taxpayer relied upon that rule.

86 Ill. Admin. Code § 100.3700(d), 11 Ill. Reg. 12410, 12421. Current § 3380(c) reads the same as its predecessor did in 1987.

A. The Authority Underlying The Department's Promulgation of § 3380(c).

When first promulgated, § 3380(c) was a brand new regulation, and it was situated within a section of regulations the Department had previously promulgated to articulate special rules interpreting the provisions of 304 of the IITA. 11 Ill. Reg. 12410. In ¶ 4 of the Department's Notice of Adopted Amendments, the Department identified IITA §§ 304(e), 304(f) and 1401(a) as the statutory authority for the new rule. *Id*.

Section 304 describes how nonresidents are to allocate and/or apportion business income. Section 304 provides, in relevant part:

> Business income of persons other than residents.
> (a) In general. The business income of a person other than a resident shall be allocated to this State if such person's business income is derived solely from this State. If a person other than a resident derives business income from this State and one or more other states, then, except as otherwise provided by this Section, such person's business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the sum of the property factor (if any), the payroll factor (if any) and 200% of the sales factor (if any), and the denominator of which is 4 reduced by the number of factors other than the sales factor which have a denominator of zero and by an additional 2 if the sales factor has a denominator of zero.
> * * *
> (d) Transportation services. Business income derived from furnishing transportation services shall be apportioned to this State in accordance with paragraphs (1) and (2):
> (1) Such business income (other than that derived from transportation by pipeline) shall be apportioned to this State by multiplying such income by a fraction, the numerator of which is the revenue miles of the person in this State, and the denominator of which is the revenue miles of the person everywhere. For purposes of this paragraph, a revenue mile is the transportation of 1 passenger or 1 net ton of freight the distance of 1 mile for a consideration. ***
> * * *
> (e) Combined apportionment. Where 2 or more persons are engaged in a unitary business as described in

> subsection (a)(27) of Section 1501, a part of which is conducted in this State by one or more members of the group, the business income attributable to this State by any such member or members shall be apportioned by means of the combined apportionment method.
> (f) Alternative allocation. If the allocation and apportionment provisions of subsections (a) through (e) do not fairly represent the extent of a person's business activity in this State, the person may petition for, or the Director may require, in respect of all or any part of the person's business activity, if reasonable:
> (1) Separate accounting;
> (2) The exclusion of any one or more factors;
> (3) The inclusion of one or more additional factors which will fairly represent the person's business activities in this State; or
> (4) The employment of any other method to effectuate an equitable allocation and apportionment of the person's business income.

35 **ILCS** 5/304 (*formerly* Ill. Rev. Stat. ch. 120, ¶ 2-304 (1987)).

When supporting the proposed regulation following the issuance of an objection issued by the Joint Committee on Administrative Rules ("JCAR"), the Department relied upon the Illinois Supreme Court's decision in Caterpillar Tractor Co. v. Lenkos. *See* 11 Ill. Reg. 12473 (the Department's published response to JCAR's objection). After the Department made changes to the regulation as originally proposed, with JCAR's agreement,[1] JCAR did not take steps it could have taken had the Department's changes not remedied its objection. Ill. Rev. Stat. ch. 127, ¶ 1007.06(d), (g) (1987). The absence of any JCAR statements published in the Illinois Register following the Department's

[1] When finally adopted by the Department, regulation 3380(c) had been modified, in part, by adding the second and third sentences "[p]er agreement with JCAR". 11 Ill. Reg. 12411 (¶ 11). In paragraph 11 of the Department's Notice of Adopted Amendment, the Department identified all the modifications to the original version of the proposed regulation. 11 Ill. Reg. 12410-11 (¶ 11 of the Notice is titled: "Differences between proposal and final version [of regulation]"). In paragraph 12 of its Notice of Adopted Amendment, the Department replied "Yes" to the question: "Have all the changes agreed upon by the agency and JCAR been made as indicated in the agreement letter issued by JCAR?" 11 Ill. Reg. 12411 (¶ 12).

response to its objection indicates that JCAR was ultimately persuaded that a consistent reading of related sections of the IITA, including §§ 304(e)-(f), 1501(a)(27), as well as the Caterpillar decision, supported the regulation's stated method of apportioning the business income of nonresident partners who, together with a partnership (or partnerships), conducted a unitary business within the water's edge of the United States.

Section 304(f) allows a taxpayer or the Department to use a method other than one of the statutory apportionment methods where necessary "… to effectuate an equitable allocation and apportionment of a person's business income." 35 **ILCS** 5/304(f). Ordinarily, the specific facts of a given person's business will be the best guide when deciding whether the assigned statutory apportionment method equitably allocates and apportions the person's business income. *See, e.g.*, Miami Corp. v. Department of Revenue, 212 Ill. App. 3d 702, 571 N.E.2d 800 (1st Dist. 1991) ("The three-factor formula, *as applied to [taxpayer]*, grossly distorts the income that should be apportioned to Illinois.") (emphasis added). What regulation § 3380(c) did, however, was to announce a specific method of alternative apportionment that the Director would require to be used by all members of a specific class of persons — nonresident partners who, together with other related persons, conduct a single unitary business, and which unitary business includes one or more partnerships that conduct business within the water's edge of the United States. As a matter of basic Illinois administrative law, the only way for the Director to announce such a requirement to the general public was through the process of rulemaking, pursuant to the Illinois Administrative Procedures Act ("IAPA"). 5 **ILCS** 100/5-5 *et seq*.

When the Department promulgated regulation § 3380(c), the Illinois Supreme Court had already held in Caterpillar that the Director could require the use of combined reporting for nonresidents who were members of a unitary business (Caterpillar, 84 Ill. 2d at 120-21, 417 N.E.2d at 1353), even though the Court subsequently acknowledged that nothing within the text of § 304(a) expressly authorized the use of combined reporting. General Telephone Co. v. Johnson, 103 Ill. 2d 363, 371, 469 N.E.2d 1067, 1071 (1984) ("The language itself of section 304(a) does not authorize combined apportionment."). The Court in Caterpillar also described why unitary apportionment was a more equitable method of reporting, allocating and apportioning business income in the case of a group of persons who, together, conduct a unitary business:

> The unitary apportionment method or as it is described in the case of a group of commonly owned and controlled corporations, the combined reporting method of reporting the income of the plaintiffs from what are literally worldwide sources, should have been applied, the plaintiffs said, since they qualified as a unitary business group. A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations. Because of this integrated relationship, which is reflected in all phases of the business operations, it is extremely difficult, for purposes of taxation, to determine accurately the measure of taxable income generated within a State by an individual corporation of the unitary group which is conducting business in the State. Typically, the corporation's transactions and the income derived from them actually represent the business efforts of the individual corporation, plus effort of other and possibly all members of the unitary business operation. As a result, the claimed income of each member of the group standing alone does not, in a real sense, reflect the conducting of a unitary business operation because the income is not attributable solely to the effort of the particular corporation.

Caterpillar, 84 Ill. 2d at 108, 417 N.E.2d at 1347.

The critical holding of the Caterpillar court is set forth in the following paragraph:

> *** An examination of various relevant provisions of UDITPA, the [Multistate Tax Commission], and the Illinois Income Tax Act shows that the language in each pertaining to the allocation and apportionment of business income is very similar and in some instances virtually identical. For example, the term "business income" is defined in section 1501(a)(1) of the Illinois Income Tax Act (Ill.Rev.Stat.1979, ch. 120, par. 15-1501(a)(1)) in language, except for one additional sentence not concerned in this case, identical to the language used in section 1(e) of UDITPA and article IV, section 1(a), of the MTC to define the same term. An example of even greater significance and persuasiveness is that the three-factor apportionment formula of sales, property and payroll in the Illinois Income Tax Act, apart from some minor change not relevant here, is identical to the formula set out in UDITPA which, as we have already determined, authorizes the use of the unitary method. **Considering that these provisions taken from UDITPA are part of the Illinois Income Tax Act and that the official commentary on the Act states that the rules for allocation and apportionment under sections 301 through 307 of the Act (Ill.Rev.Stat. 1979, ch. 120, pars. 3-301 through 3-307) have embodied the principles underlying article IV of the MTC, which is UDITPA, it is clear that the use of the combined or unitary apportionment method is authorized under the Act and could be required by the Department in the case of unitary business groups**. **The purpose of this method, as has been said, is to permit the fair determination of the portion of business income that is attributable to business activity in Illinois by the reporting member of the unitary group.** The concern, it is emphasized, is in making a fair determination of tax liability. This is why the legislature provided that, if the calculation of liability made by using the combined or unitary reporting method does not accurately and fairly represent the taxable business activity in Illinois, under section 304(e) of the Illinois Income Tax Act the taxpayer may petition that another method of determination be used. Ill.Rev.Stat.1979, ch. 120, par. 3-304(e).

Caterpillar, 84 Ill. 2d at 120-21, 417 N.E.2d at 1353 (emphasis added).

To sum up, therefore, income tax regulation § 3380(c) is the properly promulgated manifestation of the Director's almost fifteen-year-old decision to require a particular method of combined apportionment to be used by any nonresident corporate partner that is, in fact, engaged in a unitary business within the water's edge of the United States, and whose unitary business includes a partnership (or partnerships) through which the partner conducts part of its unitary business. The regulatory history unequivocally shows that the Department promulgated regulation § 3380(c) to administer and enforce the combined reporting provisions of the IITA, including those reflected by §§ 304(e) and 1501(a)(27). Section 304(f) had always given the Director the authority to require the use of an alternative method of apportionment where necessary "… to effectuate an equitable allocation and apportionment of the person's business income." 35 **ILCS** 5/304(f) (*formerly* Ill.Rev.Stat. ch. 120, ¶ 5-304(f) (1969)). Section 304(e) specifically requires the use of the combined method of reporting and apportionment "[w]here more than 2 persons are engaged in a unitary business as described in subsection (a)(27) of Section 1501 …." 35 **ILCS** 5/304(e). But even before that section was added to the IITA, the Illinois Supreme Court expressly held in Caterpillar that the Director could require the use of the combined method of reporting and apportionment in the case of unitary groups. Caterpillar, 84 Ill. 2d at 120-21, 417 N.E.2d at 1353.

B. Does Income Tax Regulation § 3380(c) Contradict § 305(a) of the IITA?

"ACME" claims that regulation § 3380(c) contradicts the plain language of § 305 of the IITA. *E.g.*, Taxpayer's Post-Hearing Brief ("'ACME's" Brief"), pp. 10-11, 14-16. Section 305

of the IITA provides:

> Allocation of Partnership Income by partnerships and partners other than residents.
> (a) Allocation of partnership business income by partners other than residents. The respective shares of partners other than residents in so much of the business income of the partnership as is allocated or apportioned to this State in the possession of the partnership shall be taken into account by such partners pro rata in accordance with their respective distributive shares of such partnership income for the partnership's taxable year and allocated to this State.
> (b) Allocation of partnership nonbusiness income by partners other than residents. The respective shares of partners other than residents in the items of partnership income and deduction not taken into account in computing the business income of a partnership shall be taken into account by such partners pro rata in accordance with their respective distributive shares of such partnership income for the partnership's taxable year, and allocated as if such items had been paid, incurred or accrued directly to such partners in their separate capacities.
> (c) Allocation or apportionment of base income by partnership. Base income of a partnership shall be allocated or apportioned to this State pursuant to Article 3, in the same manner as it is allocated or apportioned for any other nonresident.
> (d) Cross reference. For allocation of partnership income or deductions by residents, see Section 301(a).

35 **ILCS** 5/305.

To support its argument that regulation § 3380(c) contradicts IITA § 305(a), "ACME" cites the rule of statutory interpretation that the more specific statutory provision should govern over a more general one. "ACME's" Brief, pp. 17-18. "ACME" argues that § 305(a) more specifically describes how partnerships and partners are to allocate and apportion the business income that is attributable to the activities of a partnership than § 304(e). It further argues that, since § 305 is more specific than § 304,

it is improper to even consider § 304(e)'s requirement that persons engaged in a unitary business use combined apportionment. *Id.*

There are several problems with "ACME's" isolated reading of § 305(a), and chief among them is the fact that § 305(a) contains not one word which describes how a nonresident partner might use combined apportionment in the case of a partnership which is, in fact, part of one (or more) of its partner's unitary business(es). Since § 305(a) says absolutely nothing about combined apportionment for partners or partnerships that might be engaged in a unitary business with other persons, it simply does not specifically address the situation in which "ACME" finds itself. "ACME" is a corporate partner who conducts a unitary transportation business within and outside Illinois, and that unitary business includes three Partnerships though which "ACME", in fact, conducts part of that unitary transportation business within the water's edge of the United States. Stip. ¶¶ 4-5, 7.

In that crucial respect, the text of § 305(a) today, and in the years at issue, is perfectly comparable to the text of § 304(a) as written when the Caterpillar case was wending its way through the Illinois court system, and as it is still written today. Specifically, §§ 304(a) and 305(a) both direct, and both have always directed, how the business income attributable to the operations of a single business entity that conducts a multistate business both within and outside Illinois is to be allocated and apportioned. *Compare* 35 **ILCS** 5/304(a) (*formerly* Ill.Rev.Stat. ch. 120, ¶ 5-304(a) (1981)) *with* 35 **ILCS** 5/305(a) (*formerly* Ill.Rev.Stat. ch. 120, ¶ 5-305(a) (1981)).[2] Prior to the

[2] The different sections each also address how to allocate and apportion the business income derived from a single business entity that conducts business wholly within Illinois, but that is not the situation here.

Caterpillar decision, each of the related Caterpillar corporations that were, in fact, engaged in a worldwide unitary business, used the single entity method of apportionment described in § 304(a) when calculating their individual Illinois income tax liabilities. Caterpillar Tractor Co., 84 Ill. 2d at 107-08, 417 N.E.2d at 1346-47.

The Caterpillar Court, however, never viewed the absence of language expressly authorizing the use of combined apportionment in § 304(a) as evincing the Illinois General Assembly's intent to *preclude* its use by nonresidents. *See id*. To the contrary, the Court held that the IITA allowed the Director to require combination where a nonresident is not a single corporation conducting a multistate business, but is, in fact, engaged in a unitary business with others. Caterpillar, 84 Ill. 2d at 120-21, 417 N.E.2d at 1353. Following the Caterpillar decision, the Illinois General Assembly enacted § 304(e) to specifically provide that:

> Where 2 or more persons are engaged in a unitary business as described in subsection (a)(27) of Section 1501, a part of which is conducted in this State by one or more members of the group, the business income attributable to this State by any such member or members shall be apportioned by means of the combined apportionment method.

35 **ILCS** 5/304(e).

Note that § 304(e) does not state that "[w]hen 2 or more *of certain* persons are engaged in a unitary business … the business income … shall be apportioned by means of the combined apportionment method." Nor does it state that "[w]hen 2 or more persons *other than partners* are engaged in a unitary business … the business income … shall be apportioned by means of the combined apportionment method." The Illinois General Assembly is presumed to have known, when it amended the IITA to require combined apportionment for persons who conduct a unitary business, that the IITA's

definition of "person" had always provided that "[t]he term 'person' shall be construed to mean and include [among other entities] … a … partnership …." 35 **ILCS** 5/1501(a)(18) (*formerly* Ill.Rev.Stat. ch. 120, ¶ 5-1501(a)(16) (1969)). Thus, there should be no doubt that the plain and clear text of § 304(e) reflects the Illinois General Assembly intent that combined apportionment be used by all persons who, in fact, "are engaged in a unitary business as described in subsection (a)(27) of Section 1501, a part of which is conducted in this State by one or more members of the group …." 35 **ILCS** 5/304(e).

The word "shall" as used in § 304(e), moreover, is ordinarily understood as being mandatory. Newkirk v. Bigard, 109 Ill. 2d 28, 33, 485 N.E.2d 321, 323 (1985). The Illinois appellate court clearly confirmed the mandatory nature of § 304(e) in A.B. Dick Co. v McGaw, when it held that:

> … combined reporting is not an aberration; it is a necessary tool to prevent the triumph of corporate formality over economic reality. *Citizen's Utilities*, 111 Ill. 2d at 40, 488 N.E.2d at 987. ... Neither the Department nor the taxpayer has a choice whether combined returns are filed. **If the business is unitary, combined reporting is required.** ***

A.B. Dick Co. v McGaw, 287 Ill. App. 3d 230, 238, 678 N.E.2d 1100, 1105 (4th Dist. 1997) (emphasis added).

Contrary to "ACME's" argument, therefore, it is § 304(e), and not § 305(a), which is more specifically applicable to a nonresident partner who, like "ACME", conducts a unitary business within and outside Illinois, and where it conducts part of that unitary business as a partner in partnerships. As between the express text of both sections, only § 304(e) provides specific guidance to persons who conduct a unitary business, and, as a matter of simple definition, § 304(e)'s use of the term "person" reflects the legislature's

intent to require the use of combined apportionment where a unitary group includes a nonresident partner and a partnership.

While arguing that the Illinois General Assembly's enactment of § 304(e) "… [did not] modif[y] the specific partnership apportionment rule in Section 305" ("ACME's" Brief, p. 12), "ACME" also acknowledges that §§ 305 and 304 must be read together. Specifically, when addressing § 305(c)'s direction that base income of a partnership is to be allocated or apportioned to Illinois using the apportionment rules in Article 3 of the IITA, "ACME" asserts that, "[i]n this case, …" that provision means that "… the income of the Alaskan Partnerships must be apportioned using the 'barrel mile' apportionment factor applicable to transportation by pipeline." "ACME's" Brief, p. 9 (*citing* 35 **ILCS** 5/304(d)(2)). "ACME" thus suggests that § 305(c) refers only to the first four subsections of § 304, which prescribe the apportionment methods to be used by three-factor filers, and by the three particular industries required to use single factor apportionment. *Compare* "ACME's" Brief, p. 9 *with* 35 **ILCS** 5/304(a) (pertaining to nonresidents, who, during the years at issue, use three factor apportionment), (b) (pertaining to insurance companies, which used single factor apportionment), (c) (pertaining to financial organizations, which use single factor apportionment), (d) (pertaining to transportation companies, like "ACME", which use single factor apportionment).

But why should § 305(c) be understood as relating, in this case or generally, solely to some parts of § 304 but not to others? A statute should be construed as a whole, so that no word or phrase is rendered superfluous or meaningless. Texaco-Cities Service Pipeline Co. v. McGaw, 182 Ill. 2d 262, 270, 695 N.E.2d 481, 485 (1998). Section

305(c)'s text expressly provides that partnership base income "… shall be allocated and apportioned to this State … *in the same manner as it is allocated or apportioned for any other nonresident*." 35 **ILCS** 5/305(c) (emphasis added). All other nonresidents who conduct a unitary business, be they three-factor filers or single-factor filers, are required to use combined reporting and apportion the business income from all of its unitary activities. Citizens Utilities Co., 111 Ill. 2d at 43, 488 N.E.2d at 988 ("We find no compelling reason to depart from the clear language of section 304 requiring formula apportionment for all unitary businesses, including public utilities.").

So, while "ACME" argues that § 305 must be understood to control this matter, the whole text of § 305 simply cannot be given effect if § 305(c) is understood to refer only to § 304(a)-(d), but never to § 304(e). And therein lies the fallacy of "ACME's" argument that, "[n]othing in Section 305 indicates that the legislature intended to carve out an exception for partnerships that stand in a unitary business relation with a corporate partner." "ACME's" Brief, pp. 16-17. The legislative exception is not expressed in § 305, but in § 304.

Not only is the text set forth within a given statutory provision to be construed so as to give effect of all of the words used within the provision itself, but the different sections within a statute should be construed consistently whenever possible. Mann v. Bd. of Non-High School Dist. No. 216, 406 Ill. 224, 230, 92 N.E.2d 743, 746 (1950) ("It has long been held in this State that sections of the same statute should be construed as being consistent rather than inconsistent and should be interpreted as being in pari materia."). If the language in different sections can be reconciled, that is the preferred construction. *See* Amman Food & Liquor, Inc. v. Heritage Insurance Co., 65 Ill. App. 3d

140, 147, 382 N.E.2d 562, 567 (1st Dist. 1978) ("… terms used in a legislative act are to be assigned harmonious meanings if possible ….").

"ACME" apparently disagrees, and would have one conclude that § 305(a) simply cannot be reconciled with Illinois' scheme of mandatory combined apportionment for persons who conduct a unitary business. *See* "ACME's" Brief, pp. 12-19. Specifically, "ACME" argues that the text of § 305(a) absolutely precludes it from including the business income it earned from transporting oil through Alaska as part of the income it derived from all of the unitary business activities it conducted within the water's edge of the United States. *E.g.*, "ACME's" Brief, p. 17 ("… the partnership rule in Section 305 is too specific and clear to permit any ambiguity and must be followed."). However, the only way to accept "ACME's" argument that IITA § 305(a) precludes the Director from requiring it to report and apportion as part of its business income the amount it derived from the activities of Partnerships with which it was engaged in a unitary business, is to read § 305(a) in a vacuum, and isolated from the other related provisions of the IITA. *But see* Casteneda v. Illinois Human Rights Comn'n, 132 Ill. 2d 304, 318, 547 N.E.2d 437, 443 (1989) ("A court should consider each part or section of a legislative act in connection with every other part or section, and not each part alone, in determining the purpose or intent of the legislature.").

When interpreting two related statutory provisions, they should be construed in light of the general purpose and object of the act, so as to give effect to the main intent and purpose of the legislature. *Id.*; People ex rel. Hutchcraft v. Louisville & N.R. Co., 396 Ill. 502, 72 N.E.2d 194 (1947). What Illinois' scheme of water's edge combined apportionment attempts to "apportion" is the business income of the entire unitary group,

some of whose members may conduct business wholly or partially within Illinois and some of whose members may conduct business wholly outside Illinois. General Telephone Co., 103 Ill. 2d at 371-72, 469 N.E.2d at 1071; Citizens Utilities Co. of Illinois v. Department of Revenue, 111 Ill. 2d at 40, 488 N.E.2d at 987. Combined apportionment differs from an apportionment scheme — like the ones expressed by the text of IITA §§ 304(a) and 305(a) — which seeks to apportion only the business income earned by a single entity that conducts business in several states. General Telephone Co., 103 Ill. 2d at 371-72, 469 N.E.2d at 1071.

Illinois courts have routinely acknowledged that the two main reasons why combined apportionment is preferred in the case of unitary businesses is to provide for a more fair and accurate measure of the business' income, and to avoid the elevation of corporate form over economic substance. In Citizens Utilities, for example, the Illinois Supreme Court noted:

> When a unitary business is carried on by an associated group of corporate entities, commonly referred to as a "unitary business group," resort to formula apportionment is also in order; a group of assets is used by the same overall entity for the generation of income through operation of a single, unitary business. **If corporate forms were respected, State income taxation would be as artificially limited and open to manipulation as is the method of separate accounting. To prevent the triumph of corporate formality over economic substance, "combined reporting" is a necessary tool.** (Mobil Oil Corp. v. Commissioner of Taxes (1980), 445 U.S. 425, 440, 100 S.Ct. 1223, 1233, 63 L.Ed.2d 510, 523 (unitary businesses should be taxed on the basis of economic activity not the form of investment).) ***

Citizens Utilities Co., 111 Ill. 2d at 40, 488 N.E.2d at 987 (emphasis added).

In this case, for example, accepting "ACME's" isolated reading of § 305(a) would require me to conclude that the legislature intended that "ACME" have the ability to treat the business income it earned from transporting oil by pipeline through Alaska as though such activities had nothing whatever to do with the business income it received from transporting oil by pipeline through the water's edge of the United States, including Illinois. Considering that Illinois courts have consistently held that the Illinois General Assembly had precisely the opposite intent regarding mandated combined apportionment as a tool to prevent the elevation of corporate form over economic substance, I cannot agree with "ACME's" proffered interpretation. *See, e.g.*, Citizens Utilities Co, 111 Ill. 2d at 40, 488 N.E.2d at 987; A.B. Dick Co., 287 Ill. App. 3d at 238, 678 N.E.2d at 1105.

And, as a factual matter, when "ACME" transported oil by pipeline through Alaska as a partner, there can be no dispute that it was acting pursuant to its own interest, just like each and every one of its other partners. For example, it is undisputed that the effect of the "TAPS" agreement was that:

> Each of the owners of "TAPS" had the obligation to conduct the operation of its undivided interest in the pipeline as a common carrier to the extent of its interest in the pipeline. In this capacity, each owner would (a) publish and file tariffs in its own name, (b) separately solicit and receive tenders of petroleum from shippers, (c) separately arrange for the shipping of the petroleum and (d) separately collect and account for revenues from its own pipeline shipments. Each of the owners of "TAPS" was responsible for scheduling its own shipments through the pipeline and for the scheduling of the ships to take the oil at the Port of Valdez terminal.

Stip. ¶ 25; Stip. Ex. 20. Given those facts, treating the income "ACME" earned from transporting oil by pipeline through Alaska as though it had nothing to do with its other transportation activities conducted within the water's edge of the United States would be

to blind oneself from the economic realities of "ACME's" unitary business operations. Stip. ¶¶ 4-5, 7. As between two different constructions of §§ 305(a) and 304(e), one of which respects economic reality, and the other which denies it, the former must be preferred. Casteneda, 132 Ill. 2d at 318, 547 N.E.2d at 443 (court must construe legislative intent using text of statute, nature and object of the legislation, and the consequence of construing it one way or the other); Citizens Utilities Co., 111 Ill. 2d at 40, 488 N.E.2d at 987 (combined reporting necessary to prevent elevation of corporate form over economic substance).

After taking into account the interrelationship of §§ 304 and 305, the applicable definitions found within § 1501, and the Illinois General Assembly's underlying purposes when adopting water's edge combination, I cannot agree with "ACME's" implied argument that § 305(a) must be considered an exception to Illinois' scheme of requiring combined apportionment, at least for nonresidents who conduct part of their unitary business as partners in partnerships. In this case, that interpretation of § 305(a) serves as a beard to cover the utter pretension that the business income earned by "ACME's" activities in its unitary Partnerships had nothing whatever to do with its other unitary business activities conducted within the water's edge of the United States. Stip. ¶¶ 1-7.

II. Does Regulation § 3380(c) Violate IITA § 1501(a)(27)'s Requirement That A Unitary Business Group Be Composed of Persons Sharing Common Ownership and Strong Centralized Management?

Even though it concedes that its activities and the activities of the Partnerships constitute a unitary business as that term is defined in § 1501(a)(27), "ACME" argues that it did not maintain a unitary relationship with the Partnerships because it did not have sufficient interest in the Partnerships to control their major decisions, as required by the

separate Partnership agreements. "ACME's" Brief, pp. 20-22. While I will discuss the merits of this argument, I first note that "ACME" has, by its stipulation, waived this issue.

Whether a person is engaged in a unitary business with others is a question of fact. Citizens Utilities Co., 111 Ill. 2d at 47, 488 N.E.2d at 990. To find that two or more persons are, in fact, engaged in a unitary business, one must first find, as necessary facts, that such persons: share common ownership; are engaged in the same general line of business; etc. 35 **ILCS** 5/1501(a)(27); A.B. Dick Co., 287 Ill. App. 3d at 232, 678 N.E.2d at 1102 ("More than common ownership is required for a unitary business."). Here, the parties stipulated to the ultimate fact — that "ACME's" activities and the Partnerships' activities constituted a unitary business, as that term is defined in § 1501(a)(27). Stip. ¶ 7.

A stipulation is a judicial admission, which cannot be controverted by the parties making the stipulation. In re Estate of Rennick, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998). "A judicial admission is a formal act which waives or disposes with the production of evidence, by conceding for purposes of litigation that the proposition of fact is true." Giamanco v. Giamanco, 111 Ill. App. 3d 1017, 1022, 444 N.E.2d 1090, 1093 (5th Dist. 1982) (internal quotation marks omitted). There is simply no need to discuss, in this case, whether the evidence establishes that "ACME" and the Partnerships were engaged in a unitary business, as would be necessary in a case where unity was disputed. Here, it is not. Stip. ¶ 7.

In any event, the proviso "ACME" appends to its stipulation of the ultimate fact quibbles over mere semantics. First, "ACME" has offered no rational reason why income tax regulation § 3380(c)'s first clause, "[w]hen the activities of a corporate partner (or the

activities of a unitary business group including the corporate partner) and the activities of a partnership, disregarding ownership requirements, constitute a unitary business relationship …", should be understood to mean anything but what the stipulated facts reflect in this case — that the activities of the Partnerships and the activities of "ACME", the nonresident partner with the Illinois reporting obligation, constituted a unitary business, as that term is defined in § 1501(a)(27). Stip. ¶ 7. The regulation's use of the phrase "unitary business relationship" should be read objectively, not subjectively, in a parsing, "only-I-get-to-say-whether-it's-a-relationship" manner.

Moreover, facts define most relationships — not a party's willingness to admit that the relationship exists. *E.g.*, Anderson v. Boy Scouts of America, Inc., 226 Ill. App. 3d 440, 444, 589 N.E.2d 892, 894 (1st Dist. 1992) (whether a principal-agency relationship exists is a question of fact); Browder v. Hanley Dawson Cadillac Co., 62 Ill. App. 3d 623, 629, 379 N.E.2d 1206, 1211 (1st Dist. 1978) (whether a broker is an agent for the insured, the insurer or both is a question of fact); Tansey v. Robinson, 24 Ill. App. 2d 227, 234 (1st Dist. 1960) (whether relation of employer-employee, principal-agent or owner-independent contractor exists is question of fact). Here, there is no dispute regarding the facts. Stip. ¶¶ 4-5, 7.

Under Illinois law, when a person with an Illinois reporting obligation is, in fact, engaged in "… a unitary business as described in subsection (a)(27) of Section 1501, a part of which is conducted in this State by one or more members of the group, …" that fact alone triggers its mandatory obligation to file combined returns and to apportion the business income derived from its entire domestic unitary business. 35 **ILCS** 5/304(e), 5/1501(a)(27); A.B. Dick Co., 287 Ill. App. 3d at 238, 678 N.E.2d at 1105. "ACME's"

peculiar notion that a "unitary business relationship" exists only where one person is able to absolutely control the actions of another related person (*see* "ACME's" Brief pp. 20-21) ought not be allowed to trump its stipulation "… that its activities and the activities of the Partnerships constituted a unitary business as defined in § 1501(a)(27) of the [IITA] …." Stip. ¶ 7. I conclude that "ACME's" judicial admission of the ultimate fact of unity acts as a waiver of its "lack of control" argument. Giamanco, 111 Ill. App. 3d at 1021-22, 444 N.E.2d at 1093-94 (father's pretrial written admission that he was able to pay maintenance to former spouse waived his post-trial motion which purported to show why he was unable to pay the amount of maintenance awarded); Dayan v. McDonald's Corp., 125 Ill. App. 3d 972, 983, 466 N.E.2d 958, 967 (1st Dist. 1984) (franchisee's clear and unequivocal testimony that franchiser's quality standards were accurately contained in franchiser's documents supported trial court's refusal to admit contrary evidence purporting to show that different standards existed); Michael Graham, Cleary & Graham's Handbook of Illinois Evidence ¶ 802.11 (7th ed. 1999).

But if I am wrong to conclude that "ACME's" stipulation of an ultimate fact waives its inconsistent argument that can only serve to undercut the truth of that fact (*see* Borden Chemicals & Plastics, L.P. v. Zehnder, 312 Ill. App. 3d 35, 726 N.E.2d 73, 77 (1st Dist. 2000)), I still conclude that it maintained common ownership and strong management control over the activities it conducted through the Partnerships, at least to the extent of its interest in them. More pointedly, I reject "ACME's" argument that regulation § 3380(c) enlarges § 1501(a)(27)'s definition of a unitary business group.

"ACME", through its subsidiaries, owned a 50.02% interest in "TAPS", a 38% interest in "Mukluk" and a 57% interest in "Inuit". Stip. ¶¶ 18-19, 28-29, 33-34.

"ACME" was, in fact, the largest single interest holder in the "Inuit" and "TAPS" Partnerships. Stip. ¶¶ 19, 34. It was the managing partner of "Inuit" (Stip. ¶ 36), and it owned over 50% of the shares of the corporation that managed "TAPS". Stip. ¶¶ 22-24. Thus, it must at least be noted that, even if "ACME's" particular argument here were correct, and § 304(e)'s phrase "… in the case of corporations …" is construed to mean "… in the case of all persons …", "ACME" would still meet that definition for "Inuit" and "TAPS". Stip. ¶¶ 18-19, 24 ("TAPS"), 34-36 ("Inuit").

Even in the case of "Mukluk", "ACME's" agreement was required before that Partnership made any major decision. Stip. ¶¶ 29-30. In fact, that is the case for each Partnership. Each Partnership agreement provides, in substance, that partners holding interests in an amount that exceeds any individual partner's total interest were required to agree on major decisions. Stip. ¶¶ 22, 30, 33; "ACME's" Brief pp. 20-21. Thus, "ACME" had to agree with whatever action each Partnership took, or the action could not be undertaken. Stip ¶¶ 21-25, 29-30, 34-38. Notwithstanding its argument, therefore, "ACME" controlled each Partnership in that each could only make a major decision if "ACME" agreed with it.

And contrary to "ACME's" argument that regulation § 3380(c) broadens the IITA's definition of a unitary business group, the plain and clear text of § 1501(a)(27) should not be construed to mean that the amount of common ownership required before the activities of one corporation may be considered unitary with the activities of another corporation must also apply before the activities of a partnership might be considered unitary with the activities of (one or more of) its partners' unitary business(es). Section 1501(a)(27) expressly provides that "[c]ommon ownership *in the case of corporations* is

the direct or indirect control or ownership of more than 50% of the outstanding voting stock of the persons carrying on the unitary business activity." 35 **ILCS** 5/1501(a)(27) (emphasis added). Had the General Assembly intended a similar requirement to exist before the activities of a partnership could be considered unitary with the activities of one (or more) of its partner's unitary business operations, the legislature would have said so.

Thus, not only is "ACME's" argument not supported by the plain and clear text of IITA § 1501(a)(27), but it is also mitigated by the distinct differences between the partner/partnership relationship and the shareholder/corporation relationship. One of the significant differences between corporations and partnerships is that control over a partnership's affairs need not follow majority ownership interests. *See, e.g.,* Borden Chemicals, 312 Ill. App. 3d at 38-39, 726 N.E.2d at 77 (general partner owned 1.01% interest in partnership; limited partner owned 98.99% interest); 59A Am Jur 2d *Partnership* § 15 (1987). Unlike minority shareholders of a corporation, "[a] partner usually has a right to participate in the conduct and control of the partnership business …." 59A Am Jur 2d *Partnership* § 15. Additionally, partners act as mutual agents and fiduciaries for each other. Rizzo v. Rizzo, 3 Ill. 2d 291, 302, 120 N.E.2d 546, 552 (1954). Ordinary corporate shareholders do not share such a relationship.

But again, nothing gives a fact finder the authority to interpret a statute to mean something other than what it clearly says. *See* United Air Lines, Inc. v. Mahin, 49 Ill. 2d 45, 52, 273 N.E.2d 585, 589 (1971) ("… there is no rule of statutory construction which permits a court to say that the legislature did not mean what the plain language of a statute imports."), *vacated and remanded on other grounds*, 410 U.S. 623, 93 S.Ct. 1186 35 L.Ed.2d 545 (1973). When the Illinois General Assembly used the phrase "[c]ommon

ownership in the case of corporations means …", it meant just that — "… in the case of corporations …." This matter, however, does not involve a question of common ownership — it is undisputed that "ACME" owns a considerable or majority interest in each of the Partnerships. Stip. ¶¶ 18-19, 28-29, 33-36. Nor does this matter involve a question of the relationship that exists between "ACME's" activities and the activities of the Partnerships — it is undisputed that, together, their activities constitute a unitary business. Stip. ¶ 7.

Finally, "ACME's" lack of control argument is very similar to an argument rejected by the Illinois Supreme Court in Citizens Utilities. Citizens Utilities Co. of Illinois v. Department of Revenue, 111 Ill. 2d 32, 488 N.E.2d 984 (1986). There, the Court wrote:

> The taxpayer responds that the conduct of its business does not meet the Department's own definition of a unitary business as set forth in the regulations. Regulation section 300-2(c)(1)(C) requires both central management authority and use of that authority in centralized operations for a finding of strong centralized management. Although the parent's reports to shareholders admit to "centralized administrative control, policy determination, long-range planning, [and] finance," the taxpayer contends that there is no evidence to support a finding that the parent exercised its authority to create and control centralized operations. Contrary to this assertion, we find adequate support in the record for the conclusion that the parent corporation enjoyed actual, centralized control over the Citizen's group. All financial resources were controlled, and major acquisitions approved, by the parent corporation. Moreover, contracts entered into by the subsidiaries were often signed by officers of those subsidiaries — who also acted as officers of the parent — not just the local managers. **But in any event, a finding of strongly centralized management is not an indispensable factor for identifying unitary businesses**; section 300-2(c)(1)(C) places a premium on that factor only "to justify a conclusion that the operations of otherwise

> seemingly separate trades or businesses" form a unitary business. ***
>
> This case falls within section 300-2(c)(1)(A): "A trade or business carried on by more than one person is unitary in nature when all of the activities of the persons are in the same general line." **Regardless of the local conditions within which Citizens group members operate, they are all engaged in the business of supplying various public utility services.** Rather than diversify operations across a variety of industries, the Citizens group strategy, as explained in its reports to shareholders, is to diversify across geographical boundaries as protection against local market and regulatory adversities. Clearly, the entire group performs business activities "in the same general line."

Citizens Utilities, 111 Ill. 2d at 50-51, 488 N.E.2d at 992 (emphasis added).

Here also, "ACME" and each of the Partnerships are engaged in the business of transporting oil by pipeline within the water's edge of the United States. Stip. ¶¶ 4-5. Moreover, the extent of "ACME's" ownership of and management control over the Partnerships is stipulated (Stip. ¶¶ 18-27 ("TAPS"), 28-31 ("Mukluk"), 33-39 ("Inuit")), as is the fact that "ACME's" activities and the activities of the Partnerships constituted a unitary business. Stip. ¶ 7. Finally, the Illinois Supreme Court's decision in Citizens Utilities puts to rest "ACME's" argument that absolute control is required before the activities of one person might be considered unitary with the activities of another. I conclude, therefore, that the application of regulation § 3380(c) to the facts of this case does nothing to enlarge, exceed or otherwise violate the legislature's definition of a unitary business group, as set forth in IITA § 1501(a)(27).

III. Does Regulation § 3380(c) Violate United States Supreme Court Doctrine?

"ACME" further argues that Illinois' apportionment of "ACME's" Partnership business income violates United States Supreme Court doctrine set forth in ASARCO v.

Idaho Tax Commission, 458 U.S. 307 (1982); F.W. Woolworth Co. v. Taxation and Revenue Department of New Mexico, 458 U.S. 354 (1982); and Allied-Signal, Inc. v. New Jersey, 504 U.S. 768 (1992). "ACME's" Brief, pp. 21-22. This argument, of course, assumes the same premise that "ACME's" stipulation of facts belies — that "ACME" did not maintain a unitary business relationship with the Partnerships because it lacked sufficient control to dictate each Partnership's major decisions. As before, I reject that premise because it is not borne out by the stipulated facts and documents of record, and because, I believe, "ACME's" judicial admission regarding unity acts to waive its contrary argument.

Further, and notwithstanding the cases cited by "ACME", the United States Supreme Court is no more receptive than the Illinois Supreme Court to the argument that one's total or absolute control over the activities of another is dispositive before a unitary relationship may be deemed to exist. In Container Corp. of America v. Franchise Tax Bd., 453 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the United States Supreme Court, much like its Illinois counterpart in Citizens Utilities, wrote:

> … although potential control is, as we said in F.W. Woolworth, not "dispositive" of the unitary business issue, 458 U.S., at -, 102 S.Ct., at 3134 (emphasis added), it is relevant, both to whether or not the components of the purported unitary business share that degree of common ownership which is a prerequisite to a finding of unitariness, and also to whether there might exist a degree of implicit control sufficient to render the parent and the subsidiary an integrated enterprise.

Container Corp., 453 U.S. at 177 n.16, 103 S.Ct. at 2946 n.16. The Container Court further stated:

> Appellant [taxpayer] also argues that the state court erred in endorsing an administrative presumption that

> corporations engaged in the same line of business are unitary. This presumption did enter into the state court's reasoning, but only as one element among many. Moreover, considering the limited use to which it was put, we find the "presumption" criticized by appellant to be reasonable. Investment in a business enterprise truly "distinct" from a corporation's main line of business often serves the primary function of diversifying the corporate portfolio and reducing the risks inherent in being tied to one industry's business cycle. When a corporation invests in a subsidiary that engages in the same line of work as itself, it becomes much more likely that one function of the investment is to make better use — either through economies of scale or through operational integration or sharing of expertise — of the parent's existing business-related resources.

Container Corp., 453 U.S. at 178, 103 S.Ct. at 2947; *accord*, Citizens Utilities, 111 Ill. 2d at 50-51, 488 N.E.2d at 992. Here too, it is undisputed that both "ACME" and the Partnerships were engaged in the same general line of business (Stip. ¶¶ 4-5), and that the activities of "ACME" and the activities of the Partnerships constituted a unitary business. Stip. ¶ 7.

The cases cited by "ACME", moreover, do not support its argument because the facts of those cases are so distinct from the facts of this case. In none of those cases did the taxpayer stipulate that its activities and the activities of the income payor (all of the cases involved the apportionability of dividends or capital gains earned from either holding or selling stock of other businesses) constituted a unitary business. Rather, in each case, the ultimate fact of unity was at issue. For example, the Court in Allied Signal acknowledged that:

> Although Mobil Oil and Exxon made clear that the unitary business principle limits the States' taxing power, it was not until our decisions in ASARCO Inc. v. Idaho Tax Comm'n, 458 U.S. 307, 102 S.Ct. 3103, 73 L.Ed.2d 787 (1982), and F.W. Woolworth Co. v. Taxation and Revenue

> Dept. of N.M., 458 U.S. 354, 102 S.Ct. 3128, 73 L.Ed.2d 819 (1982), that we struck down a state attempt to include in the apportionable tax base income not derived from the unitary business. **In those cases the States sought to tax unrelated business activity.**
>
> ***

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 780, 112 S.Ct. 2251, 2259 (emphasis added). Even more importantly, the Allied Signal Court reiterated that:

> It remains the case that "[i]n order to exclude certain income from the apportionment formula, the company must prove that 'the income was earned in the course of activities unrelated to [those carried out in the taxing] State.'" Exxon Corp. v. Department of Revenue of Wis., 447 U.S., at 223, 100 S.Ct., at 2120 (quoting Mobil Oil Corp. v. Commissioner of Taxes of Vt., 445 U.S., at 439, 100 S.Ct., at 1232).

Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263.

Here, of course, there is no serious claim that Illinois is attempting to tax income derived from activities that are unrelated to "ACME's" unitary business of transporting oil by pipeline, part of which is conducted in Illinois and part of which is conducted outside Illinois, including in Alaska. Stip. ¶¶ 4-5, 7. That is just one of the instances pursuant to which a state may, consistent with the Due Process Clause, tax an apportioned share of the income that is attributable to the multistate activities of a nonresident. Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263 ("…the existence of a unitary relation between the payor and the payee is one means of meeting the constitutional requirement."). Under the facts of this stipulated record, I conclude that requiring "ACME" to include its pro-rata shares of partnership income and factors when apportioning the income attributable to all of its unitary business conducted within the water's edge of the United States, pursuant to income tax regulation § 3380(c), does not violate the Due Process Clause of

the United States Constitution, or any United States Supreme Court doctrine. Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263.

IV. Did the Governor's Amendatory Veto in P.A. 82-1029 Violate the Illinois Constitution?

Finally, "ACME" argues that income tax regulation § 3380(c) is invalid because IITA § 304(e), the primary statutory authority supporting that regulation, is itself void *ab initio*. "ACME" argues that § 304(e) is void because it was unconstitutionally created by a law written not by the Illinois General Assembly, but by the Governor's improper use of the amendatory veto process. *See* "ACME's" Brief, pp. 22-25. While the Department takes contrary positions to each of "ACME's" substantive arguments on this point, I believe there are even more fundamental procedural bases upon which "ACME's" arguments must be rejected.

Here, neither party disputes that "ACME" filed original and amended Illinois returns using the water's edge method of combination. Stip. ¶¶ 8-14; Stip. Exs. 10-17. The law in Illinois has long been that, in the event a statutory amendment is declared unconstitutional and void *ab initio*, the act that was in place prior to the effective date of the invalid amendment is revived when the declaration is announced. Van Driel Drug Store, Inc. v. Mahin, 47 Ill. 2d 378, 381-82, 265 N.E.2d 659, 661 (1971). But P.A. 82-1029's amendment to the IITA did not create the requirement that reporting members of unitary groups use combined reporting when calculating the amount of Illinois income due under the IITA. The Illinois Supreme Court, in its 1981 Caterpillar decision, had already declared that a whole reading of the interrelated allocation and apportionment provisions set forth within Article 3 of the IITA gave the Director the authority to require members of unitary groups to use combined reporting. Caterpillar, 84 Ill. 2d at 120-21,

417 N.E.2d at 1353.

Moreover, once a court has interpreted particular statutory provisions, that interpretation becomes part of the statute, unless the legislature subsequently amends the statute to change it. Kroger v. Department of Revenue, 284 Ill. App. 3d 473, 480, 673 N.E.2d 710, 714 (1st Dist. 1996) (*citing* Miller v. Lockett, 98 Ill. 2d 478, 483, 457 N.E.2d 14 (1983)). Almost immediately after the Caterpillar decision, the Illinois General Assembly did just that, by amending the IITA to change the Illinois Supreme Court's adoption of a method of world-wide combined apportionment in the case of a multinational unitary business to a system of water's edge combined apportionment for any and all unitary businesses. But the legislature's action did not do away with the requirement that members of unitary groups use combined reporting; rather, it changed the scope of that method. Stip. Ex. 38. The fundamental change the Illinois General Assembly made to existing Illinois law when it passed P.A. 82-1029 was to change the method of combined apportionment from worldwide combination to water's edge combination.

That point, and the purposes underlying the passage of P.A. 82-1029, were acknowledged in Beatrice v. Department of Revenue, 292 Ill. App. 3d 532, 685 N.E.2d 958 (1st Dist. 1997), when the court noted that:

> The year after the Illinois Supreme Court decided *Caterpillar*, the Illinois General Assembly added the definition of 'unitary business group' and the concept of combined apportionment to the Illinois Tax Act, but rejected the *Caterpillar* court's concept of 'worldwide combined apportionment.' See Pub. Act 82-1029, eff. December 15, 1982. ***We find that, in doing so, the legislature otherwise embraced the Illinois Supreme Court's concept of combined apportionment.***

Beatrice, 292 Ill. App. 3d at 537, 685 N.E.2d at 961 (emphasis added). Thus, even if "ACME" were correct that P.A. 82-1029 is void *ab initio*, combined reporting for members of unitary business groups would still be the law in Illinois — except that the applicable method would be world-wide combination and not water's edge combination. *See* Van Driel Drug Store, Inc. v. Mahin, 47 Ill. 2d at 381-82, 265 N.E.2d at 661.

And therein lies the heart of the procedural defects unmet by "ACME's" argument. "ACME" has never filed any return on which it reported its Illinois income tax liability using the worldwide method of combined apportionment. Rather, on each original and amended return "ACME" filed for the years at issue, it used the water's edge method of combined apportionment. Stip. Exs. 10-17; Stip. ¶¶ 8-14. The whole thrust of its arguments supporting its amended returns is that those returns correctly show the true amount of tax due under Illinois law. *See* Stip. Exs. 10-17 (each return bears the signature of an authorized officer of taxpayer under the statement, "[u]nder penalties of perjury, I declare that I have examined this return, and to the best of my knowledge it is true, correct and complete"). In a nutshell, therefore, "ACME" has filed amended returns asking for a refund of Illinois income taxes using a method of apportionment it simultaneously argues was unconstitutional from the outset. But if "ACME" is correct on the latter point, how could the Department authorize the payment of a refund that is calculated by that very same unconstitutional method. *See* People ex rel. City of Highland Park v. McKibbin, 380 Ill. 447, 451-52, 44 N.E.2d 449, 451 (1942) (taxpayer could not obtain a refund pursuant to a claim provision in an act previously declared unconstitutional *in toto*). If "ACME" is entitled to any refund because P.A. 82-1029 violated the Illinois Constitution's separation of powers provisions, that refund must be

calculated using world-wide combination, if applicable.

And that presents the second procedural basis for denying "ACME's" arguments here, at least as they pertain to its amended returns/claims for refund. World-wide combination *might* apply to "ACME's" operations

but this stipulated record does not contain sufficient facts to conclude that it

does, let alone a sufficient factual basis upon which one might actually calculate what that refund would be, if any. When it comes to its claims for refund, "ACME" bears the burden of production and persuasion. Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981) ("… when a taxpayer claims that he is exempt from a particular tax, or where he seeks to take advantage of deductions or credits allowed by statute, the burden of proof is on the taxpayer. (*citing* Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 347 N.E.2d 729 (1976); Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 410 N.E.2d 828 (1980)). Here, "ACME" has failed to show entitlement to refunds in the amounts claimed because it has failed to introduce evidence to show that: (1) it was *not* a member of a world-wide unitary group; or (2) if it did conduct a world-wide unitary business, what the amount of its refund (or tax due) would be using the world-wide method of combined apportionment adopted in Caterpillar. *See* Stip. ¶¶ 8-16.

Further, even if "ACME" is correct, and Governor Thompson improperly used his amendatory veto powers when returning P.A. 82-1029 to the Illinois General Assembly for review, that does not mean that income tax regulation § 3380(c) must also be invalid. The Illinois Supreme Court's Caterpillar decision expressly held that the Director could require combination in the case of unitary businesses (Caterpillar, 84 Ill. 2d at 120-21, 417 N.E.2d at 1353.), and "ACME" has conceded that its activities and the activities of

the Partnerships constituted a unitary business. Stip. ¶ 7. Regulation § 3380(c) was properly promulgated 14 years ago, and a properly promulgated agency regulation is presumed be valid, and to have the force and effect of law. Eastman Kodak Co. v. Fair Employment Practices Comm'n, 86 Ill. 2d 60, 70-71, 426 N.E.2d 877, 881-82 (1981).[3]

Unless one is willing to read § 305(a) as being unique among the other allocation and apportionment provisions of the IITA, or as being repugnant to the Illinois Supreme Court's interpretation of those related provisions in Caterpillar, there is no reason why the same rationale the Supreme Court used in Caterpillar should not also be applied to the Director's decision to require a specific class of nonresidents who conduct a unitary business to use a specific method of combined apportionment "… to effectuate an equitable allocation and apportionment of [such] person's business income." 35 **ILCS** 5/304(f). Since Caterpillar, Illinois courts have routinely acknowledged that combined apportionment is the preferred method of apportioning the business income of persons who conduct a unitary business, because that method affords a more accurate and fair measure of income earned within a state's borders, and because it helps avoid the triumph of corporate form over substance. Citizens Utilities Co., 111 Ill. 2d at 39-40, 488 N.E.2d at 987; General Telephone Co, 103 Ill. 2d at 371-72, 469 N.E.2d at 1071; A.B. Dick Co. v McGaw, 287 Ill. App. 3d at 238, 678 N.E.2d at 1105. Despite those decisions,

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[3] If "ACME" is ultimately found to be correct in its argument that both P.A. 82-1029 *and* regulation § 3380(c) are invalid, I agree that the Department would be procedurally barred from assessing the tax proposed in the NOD, which was calculated using water's edge method of combined apportionment. U.S. Const. amend V ("No person shall be … deprived of … property … without due process of law"); Ill. Const. (1970) Art. 1 § 2 (same). But I think it is clear that the Director's properly promulgated regulation requiring "ACME" to include within its combined unitary base income the business income it earned from operations that were, in fact, part of its unitary business conducted within the water's edge of the United States, does not violate the Due Process Clause of the United States, or the Illinois Constitution. Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263.

"ACME" argues that § 305(a) must be understood as requiring it to treat the business income it received from transporting oil by pipeline through Alaska as though such activities had nothing whatever to do with its unitary business of transporting oil by pipeline within the water's edge of the United States, simply because "ACME" conducted its Alaskan transportation activities as a partner in the Partnerships. Though combined apportionment would still be the law in Illinois — even without § 304(e) — "ACME's" argument clearly tries to elevate the form of its business ownership over the true facts and substance of its unitary activities.

Moving now from the procedural problems in "ACME's" argument to its substance, article IV, § 9(e) of the Illinois Constitution provides:

> (e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.

Ill. Const. art. IV, § 9(e).

Statutes are presumed constitutional, and the party challenging the constitutionality of a statute has the burden of clearly establishing the statute's unconstitutionality. In re Application for Judgment and Sale of Delinquent Properties for Tax Year 1989, 167 Ill. 2d 161, 656 N.E.2d 1049 (1995). A court is obliged to construe acts of the legislature so as to affirm their constitutionality, and all reasonable doubts must be resolved in favor of upholding statute's validity. Chicago Bar Ass'n v. Department of Revenue, 163 Ill. 2d 290, 644 N.E.2d 1166 (1994).

Between them, the parties cited the few cases in which the Illinois Supreme Court addressed a challenge to different legislative amendments that were the subject of a governor's amendatory veto. The rules drawn from those cases are that while the governor may not use the veto power to substitute an entirely new bill for the one passed by the legislature, he is not limited to merely correcting formal or technical errors. People ex rel. City of Canton v. Crouch, 79 Ill. 2d 356, 375, 403 N.E.2d 242 (1980); Continental Illinois National Bank & Trust Co. v. Zagel, 78 Ill. 2d 387, 398, 401 N.E.2d 491 (1979); People ex rel. Klinger v. Howlett, 50 Ill. 2d 242, 249, 278 N.E.2d 84 (1972).

"ACME" challenges the constitutionality of Governor Thompson's amendatory veto in this case because the Illinois General Assembly presented him with a bill whose text would have prohibited combined reporting and apportionment, which the Illinois Supreme Court had previously ruled could be required by the Director in the case of a unitary business. Stip. Ex. 38 (legislative history of H.B. 2588, which, when passed became P.A. 82-1029). The Governor sent the bill back with specific recommendations as to how the General Assembly might mend the method of combined apportionment adopted by the Caterpillar Court, without ending it. *See id.*

Thus, the "fundamental purpose" (*see* "ACME's" brief, p. 23) underlying both H.B 2588 and the Governor's recommendations was to craft and enact a legislative change to the particular method of apportionment the Illinois Supreme Court adopted in its 1981 Caterpillar decision. The General Assembly's bill presented one change; the Governor recommended another. After taking into account the Governor's specific recommendations, and a fiscal analysis of the original bill, both houses agreed that the Governor's recommendations constituted the better way to change the effect of the

Caterpillar decision. *See* Stip. Ex. 38. When discussing the legislative history of P.A. 82-1029, moreover, the Illinois appellate court recently noted and held that, by passing that act, the legislature "… rejected the *Caterpillar* court's concept of 'worldwide combined apportionment.' … *We find that, in doing so, the legislature otherwise embraced the Illinois Supreme Court's concept of combined apportionment.*" Beatrice, 292 Ill. App. 3d at 537, 685 N.E.2d at 961 (emphasis added). So, instead of being a "… completely new bill" (*see* "ACME's" Brief, p. 23), Governor Thomson's amendatory veto is more accurately described as the Governor's fine-tuning of the legislature's manifest intent to change the method of apportionment required under the IITA following the Illinois Supreme Court's Caterpillar decision. *See* Beatrice, 292 Ill. App. 3d at 537, 685 N.E.2d at 961.

The General Assembly, moreover, proceeded to adopt Governor Thompson's recommendations in precisely the manner required by the Illinois Constitution. Stip. Ex. 38; Ill. Const. art. IV, § 9(e). That is: the Governor's specific recommendations were, in fact, accepted by a record vote of a majority of the members elected to the Illinois House and Senate; the bill was, in fact, presented again to the Governor; the Governor certified that the General Assembly's acceptance conformed to his specific recommendations; and the bill, thereafter, become the law of Illinois. *Compare* Stip. Ex. 38, p. 7 (history of legislative action after Governor's amendatory veto) *with* Ill. Const. art. IV, § 9(e). After taking into account the legislative history of P.A. 82-1029, the underlying purpose of that legislation and the Illinois decisions interpreting that legislative enactment, including Beatrice, I would not conclude — even if I had the power to do so — that Governor Thompson's amendatory veto violated the Illinois Constitution.

Conclusion:

Income tax regulation § 3380(c) was properly promulgated, and therefore, it is presumed to be valid and to have the force and effect of law. Eastman Kodak Co., 86 Ill. 2d at 70-71, 426 N.E.2d at 881-82. I conclude that "ACME" has not carried its burden to show that regulation § 3380(c), or IITA § 304(e) are invalid. *Id*. at 74-75, 426 N.E.2d 883-884. I also conclude that "ACME" has not borne its burden of showing, by clear and cogent evidence, that the transportation activities in which "ACME" engaged in Alaska were wholly unrelated to the transportation activities "ACME" and its other affiliates conducted within the water's edge of the United States. Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263. To the contrary, it is undisputed that the transportation activities it performed as a partner in the Partnerships were unitary with "ACME's" other transportation activities. Stip. ¶¶ 2-7; *see also id*. ¶¶ 18-27, 28-31, 33-39. Therefore, "ACME" has not carried its burden to show that regulation § 3380(c) violates the Due Process Clause of the United States Constitution. Allied-Signal, Inc., 504 U.S. at 787, 112 S.Ct. at 2263.

I conclude that, pursuant to income tax regulation § 3380(c), "ACME", the reporting member of a unitary business group engaged in the business of transportation of oil by pipeline, was required to report the income (or losses) it received from its unitary Partnerships as part of its combined unitary base income, consistent with Illinois' method of combined water's edge apportionment. 35 **ILCS** 5/304(e)-(f), 305(c), 1501(a)(27); General Telephone Co., 103 Ill. 2d at 370-71, 469 N.E.2d at 1071; Caterpillar Tractor Co., 84 Ill. 2d at 120-21, 417 N.E.2d at 1353. I recommend that the Director finalize the tax as proposed in the NOD, and that he finalize the Notice of Denial previously issued to

"ACME".

9/7/01
Date

Administrative Law Judge